STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED March 20, 2012
v	No. 302388 Monroe Circuit Court
JULIUS CHRISTOPHER CLARK-WILLIS, Defendant-Appellant.	LC No. 09-037741-FC

Before: WHITBECK, P.J., and JANSEN and K. F. KELLY, JJ.

PER CURIAM.

Defendant appeals as of right from his jury trial conviction for armed robbery, MCL 750.529, for which he was sentenced to 10 to 40 years' imprisonment. We affirm.

I. BASIC FACTS

This case involves the robbery of Shawn Ewing. On the evening of March 4, 2009, Ewing pulled into the driveway of his mobile home located in the Meadowbrook Estates Trailer Park in Monroe, Michigan. As he got out of his vehicle, he noticed two young black men walking toward him. One of the men asked Ewing for the time. Ewing then walked to his mailbox. Suddenly, the two men were directly behind Ewing and struck him on the side of the head with a hard object. Ewing did not see the object used to strike him; however, he later saw a large rock lying next to the mailbox. The rock appeared to have blood on it.

After being hit, Ewing fell to his knees and was bleeding profusely from a wound on his head. One of the men then placed his arm around Ewing's chest and held him down. The men repeatedly demanded that Ewing give them his wallet and threatened to shoot and kill Ewing. Ewing grabbed his wallet and pulled out all the cash. One of the men grabbed the cash, and then they both took off running down the street.

Ewing was subsequently treated for his injuries. He had a large cut on his head slightly above his right eye. The cut was deep and exposed bone. As a result, Ewing received internal and external sutures. He also sustained a small skull fracture and a concussion.

The investigation led police to suspect defendant, Brian Buffaloe[1], and Deborah Cothern as possible perpetrators of the robbery.

During defendant's trial, Buffaloe testified that he and defendant were walking through the Meadowbrook Estates Trailer Park when they saw Ewing sitting inside his vehicle. Defendant asked Buffaloe if he wanted to rob Ewing. Buffaloe agreed, and defendant quickly grabbed a rock and hit Ewing in the head. Ewing fell to the ground and Buffaloe rummaged through Ewing's pockets. Buffaloe pulled out Ewing's wallet. He and defendant then ran away with the wallet to defendant's friend's house where they divided the money.

Cothern testified that she was walking together with defendant and Buffaloe near Meadowbrook Estates Trailer Park, heading to a friend's house. At some point, Buffaloe and defendant strayed away, and she continued to walk alone to the friend's house. When she arrived at the house, defendant was already there. Cothern noticed that defendant had blood on his hands.

The jury found defendant guilty of armed robbery and he was sentenced to 10 to 40 years' imprisonment. He now appeals as of right.

II. OFFENSE VARIABLE 7

Defendant argues that the trial court erroneously scored offense variable (OV) 7. We disagree. We denied defendant's motion to remand for resentencing. *People v Clark-Willis*, unpublished order of the Court of Appeals, entered August 17, 2011 (Docket No. 302388); therefore, the issue has been preserved. MCL 769.34(10); *People v Kimble*, 470 Mich 305, 309; 684 NW2d 669 (2004). We review a trial court's decision on the scoring of offense variables to determine whether the sentencing court properly exercised its discretion and whether the evidence adequately supported the score. *People v Steele*, 283 Mich App 472, 490; 769 NW2d 256 (2009). This Court will uphold the decision made by the trial court if there is any record evidence to support the score. *Id*.

OV 7 addresses aggravated physical abuse. It is scored at 50 points if "[a] victim was treated with sadism, torture, or excessive brutality or conduct designed to substantially increase the fear and anxiety a victim suffered during the offense." MCL 777.37. If "[n]o victim was treated with sadism, torture, or excessive brutality or conduct designed to substantially increase the fear and anxiety a victim suffered during the offense" then OV 7 is scored at zero points. MCL 777.37(1)(b).

Defendant argues that the trial court erroneously scored OV 7 where the record contains no evidence that defendant committed acts that constituted aggravated physical abuse. Defendant argues that he did not submit Ewing to conduct that lasted a significant period of time, nor did his conduct substantially increase the fear and anxiety that Ewing suffered during the robbery. We believe that this trial court correctly assessed defendant 50 points under OV 7. At

[1] Buffaloe, a codefendant, pleaded guilty to larceny from a person in exchange for his testimony against defendant.

trial, the testimony revealed that defendant struck Ewing in the head with a large rock. The impact caused Ewing to fall to his knees. Ewing was then held down and repeatedly threatened to be shot and killed if he did not cooperate. The restraint and continual threat to shoot and kill Ewing was designed to substantially increase his fear during the robbery. Thus, the trial court properly exercised its discretion in scoring OV 7 at 50 points.

We acknowledge this Court's recent holding in *People v Glenn*, ___ Mich App ___; ___ NW2d ___ (Docket No. 302293, issued February 28, 2012). In *Glenn*, this Court held that, in the absence of sadism, torture, or excessive brutality, OV 7 should be scored at 50 points only if defendant's conduct "was designed to cause copious or plentiful amounts of additional fear." *Id.* at slip op p 3. We concluded that "the presence of a weapon and the use of a certain amount of force or intimidation must be discounted for purposes of OV 7. All such crimes against a person involve the infliction of a certain amount of fear and anxiety. OV 7 is designed to respond to particularly heinous instances, in which the criminal acts to increase that fear by a substantial or considerable amount." *Id.* at slip op p 4. The defendant in *Glenn* robbed a party store with an air-soft gun that was made to look like a sawed-off shotgun. The defendant struck the store clerk in the head with the butt of the gun, which knocked him to the ground. He ordered the other clerks to open the cash register. The defendant took the money, hit another clerk on the head with the butt of the gun, and then fled. *Id.* at slip op pp 1-2. Neither clerk was injured. We concluded:

> While defendant may have used more violence than would be strictly necessary to complete an armed robbery, it cannot be said that his conduct was "designed to substantially increase the fear and anxiety" beyond the fear and anxiety that occurs in most armed robberies. The plain language of OV 7 reveals that it was meant to be scored in particularly egregious cases involving torture, brutality, or similar conduct designed to substantially increase the victim's fear, not in every case in which some fear-producing action beyond the bare minimum necessary to commit the crime was undertaken. [*Id.* at slip op p 4.]

We believe the facts of this are distinguishable from the facts in *Glenn.* Here, it is clear that defendant's conduct was designed to substantially increase Ewing's fear during the robbery. Unlike the victim in *Glenn*, defendant did not simply strike Ewing, take the money, and flee; rather, he and his cohort held Ewing down and repeatedly threatened to shoot and kill him if he did not cooperate. We find these facts more on point with a case cited to in *Glenn – People v Hornsby*, 251 Mich App 462; 650 NW2d 700 (2002). In *Hornsby*, we upheld the trial court's scoring of OV 7 where the defendant pointed a gun at the victim, cocked it, and repeatedly threatened to kill the victim and other individuals located in the store he was robbing. *Id.* at 468-469. We find no error in the trial court's scoring OV 7 at 50 points.

Defendant also argues that defense counsel was ineffective for failing to object to the trial court's scoring of OV 7. However, an objection to the scoring of OV 7 would have been futile and defense counsel is not ineffective for failing to raise a futile objection. *People v Thomas*, 260 Mich App 450, 457; 678 NW2d 631 (2004). Accordingly, we hold that defense counsel was not ineffective for failing to object to the scoring of OV 7 and defendant is not entitled to relief on this ground.

III. SUFFICIENCY OF THE EVIDENCE

Defendant has also filed a Standard 4 Brief in which he argues that there was insufficient evidence to support his armed robbery conviction because there was no evidence that he used a dangerous weapon. We disagree. We review sufficiency of the evidence questions de novo, in a light most favorable to the prosecution. *People v Ericksen*, 288 Mich App 192, 195-196; 793 NW2d 120 (2010). We determine whether a rational trier of fact could find that the evidence proved the essential elements of the crime beyond a reasonable doubt. *People v Railer*, 288 Mich App 213, 217; 792 NW2d 776 (2010). Circumstantial evidence and reasonable inferences may be used to prove the elements of the crime. *People v Bennett*, 290 Mich App 465, 472; 802 NW2d 627 (2010).

The elements of armed robbery are: (1) an assault and (2) a felonious taking of property from the victim's presence or person (3) while the defendant is armed with "a dangerous weapon or an article used or fashioned in a manner to lead any person present to reasonably believe the article is a dangerous weapon, or who represents orally or otherwise that he or she is in possession of a dangerous weapon." MCL 750.529; *People v Smith*, 478 Mich 292, 319; 733 NW2d 351 (2007). A dangerous weapon includes any article which is used or fashioned in a manner to induce the reasonable belief that it is a dangerous weapon. *People v Banks*, 454 Mich 469, 473; 563 NW2d 200 (1997). Further, whether an object is a dangerous weapon depends on the nature of the object and on how it is used, and it is a question of fact for the jury. *People v Jolly*, 442 Mich 458, 470; 502 NW2d 177 (1993).

In this case, there was testimony that defendant struck Ewing with a large two pound rock. The impact caused Ewing to fall to his knees. Ewing then was restrained and threatened to be shot and killed if he did not cooperate and give defendant and codefendant his money. Defendant and codefendant took Ewing's wallet and then ran away from the scene. Viewed in a light most favorable to the prosecution, this evidence was sufficient to allow the jury to find that there was an assault and a felonious taking of property from Ewing's person. There was also sufficient evidence that defendant was armed with a dangerous weapon. From this evidence, the jury could find that defendant used the large rock in a manner so as to render it a dangerous weapon within the meaning of MCL 750.529. Moreover, Ewing testified that, after being hit on the head, he was threatened to be shot if he did not cooperate. This testimony also supports the jury's finding that defendant was armed with a dangerous weapon because defendant orally represented that he was in possession of a firearm. See MCL 750.529.

Further, defendant's claim that the evidence was insufficient because no weapon was admitted at trial is also without merit. "Where conviction of an offense requires proof beyond a reasonable doubt that a defendant possessed a [dangerous weapon], this element may be proven without the actual admission into evidence of the weapon." *People v Hayden*, 132 Mich App 273, 296; 348 NW2d 672 (1984). Accordingly, we hold that there was sufficient evidence to permit the jury to find defendant guilty of armed robbery.

Affirmed.

/s/ William C. Whitbeck
/s/ Kathleen Jansen
/s/ Kirsten Frank Kelly